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GRANITE CONSTRUCTION COMPANY

Alternative Dispute Resolution Series

Case Study #2

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The Corps Commitment to Alternative Dispute Resolution (ADR):

This case study is a part of a series of case studies describing applications of Alternative Dispute Resolution (ADR). The case study is a part of a Corps program to encourage its managers to develop and utilize new ways of resolving disputes. ADR techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. ADR is a new field, and additional techniques are being developed all the time. These case studies are a means of providing Corps managers with examples of how other managers have employed ADR techniques. The information in these case studies are designed to stimulate innovation by Corps managers in the use of ADR techniques.

These case studies are produced under the proponentcy of the U.S. Army Corps of Engineers, Office of Chief Counsel, Lester Edelman, Chief Counsel; and the guidance of the U.S. Army Corps of Engineers Institute for Water Resources, Fort Belvoir, VA, Dr. Jerome Delli Priscoli, Program Manager.

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CASE STUDY #2
GRANITE CONSTRUCTION COMPANY
(THE SAND SOURCE CLAIM)

THE PROJECT AND CLAIM

SUMMARY

In March of 1987, the Mobile District of the U.S. Army Corps of Engineers and Granite Construction Company used Alternative Dispute Resolution (ADR) to negotiate a settlement of \$725,000 for an outstanding claim, originally filed for \$1,770,000. They used a hybrid non-binding arbitration procedure that allowed for senior executive negotiations after the arbitrator presented his report and recommendations. Granite submitted its original differing site conditions claim in April of 1979, after the Government condemned property that included its approved sand source.

Chris Woods, of the Al Johnson Construction Company of Minnesota, served as the neutral, and Col. C. Hilton "Stretch" Dunn, District Commander, and Richard Roberts, Executive Vice President of Granite, were the decision-makers. The Corps chose to have case presentations made by technical experts rather than attorneys. Jim Brock, Chief of Claims, and Dick Lewis, project manager, presented for the Corps and Granite respectively.

This case illustrates: 1) the advantages and disadvantages of using individual arbitrators (as opposed to panels); 2) the use of technical experts to present cases (with attorneys in advisory roles); 3) strategies that neutrals can use to help parties "save face"; and 4) ways of reframing settlements as mutually beneficial outcomes.

BACKGROUND

The Mobile District, of the U.S. Army Corps of Engineers, contracted with Granite Construction Company (Granite) to construct the Aberdeen Lock and Dam of the Tennessee Tombigbee Waterway. The Government approved R&S Haulers and Distributors, Inc. (R&S) as the sand source for Granite.

At the time the contract was awarded, the Government was in the process of negotiating the purchase of a large plot of land required for construction of waterway which included Granite's sand source. When negotiations between the Government and landowner failed, the Government was forced to condemn the property, thereby forcing Granite to seek an alternative sand source.

Granite examined at least eight different sand sites before finding a suitable one. However, the quality of the sand was inferior to the original source. The new site contributed to reduced cement production, required longer hauls than expected, caused numerous delays, and increased costs. As a result, Granite filed a differing site conditions claim based upon its inability to mine sand from an approved site because of Government actions.

CHRONOLOGY OF THE CLAIM

Granite Construction Company was awarded the contract on October 26, 1976, and notice to proceed was issued on November 22. The Government condemned the property including the sand source on January 1, 1979. Granite found an alternative site at the end of March. During the period of April 1 through July 31, the R&S production plant was dismantled and rebuilt at government expense.

As a result of the loss of the sand source and its associated delays and reduced production, Granite filed a differing site conditions claim on April 23, 1979 for \$3 million. On July 12, 1982 the claim was denied in full in the final Contracting Officer's Decision (COD). Granite filed an appeal at the Engineer Board of Contract Appeals (Board), but continued negotiations with the Corps. At this time Granite requested a Corps Division Review of the claim, and the Division Engineer in Atlanta issued a directive to the Mobile District to attempt to negotiate an equitable adjustment. At the Corps' request, Granite submitted three different proposals over time for quantum settlement, all of which were rejected. Throughout these negotiations, counsel for Granite consistently sought to use ADR as a vehicle to reach settlement. Besides verbal requests, the Granite attorney sent a letter to the district commander requesting a mini-trial but received no response.

A new district commander and his review of long standing claims led to a query on the Granite claim that resulted in the decision to propose a form of ADR to settle it. Shortly before trial, the Corps approached Granite and requested the use of an ADR procedure. Granite agreed, and on December 22, 1986 the parties signed an Alternative Dispute Resolution Agreement. An arbitrator heard the case on March 19 and 20 and delivered his report on April 9, 1987. Following this presentation, the Contracting Officer and Chief Executive Officer of Granite met separately and decided to accept the recommendation of the neutral advisor.

MAJOR ISSUES IN DISPUTE

The major issue in this claim was the condemnation of the sand source. Granite claimed the Government originally planned to condemn the site at a later date, but accelerated its schedule after receiving additional Congressional funding. Secondly, the sand source was adjacent to the area needed by the Government, and could have remained available for mining. Based on these assertions, Granite sought compensation for delays and reduced production that resulted from the search for an alternative sand source and the eventual use of inferior sand.

The Government claimed no liability for Granite's losses because the condemnation of property is a sovereign act protected by law. Secondly, it argued that Granite knew the site was going to be condemned and had time to stockpile a sufficient amount of sand for the project.

POSITIONS OF EACH SIDE PRIOR TO ADR

Prior to the decision to use ADR, the Government determined partial entitlement in the case and asked Granite to submit a settlement proposal. Granite requested \$1,925,865. The Corps counter-offered \$200,000.

DECISION TO USE ADR

RAISING THE OPTION OF ADR

When the COD was issued and throughout eight years of settlement negotiations, Mr. Adrian Bastianelli, III, counsel for Granite, requested a mini-trial to resolve the claim. Bastianelli attributed district resistance to a mini-trial to technical staff dissatisfaction with the outcomes of two prior Corps mini-trials (Industrial Contractors, and Tenn Tom Constructors). The district's attitude was that two parties should be able to settle a claim without the help of an outside third party. Bastianelli knew that the U. S. Army Corps of Engineers (USACE) was promoting ADR at the time and was prepared to call the Chief Counsel in an attempt to pressure the District to use ADR to break their impasse.

At this time, Col. C. Hilton Dunn, Jr. took over as District Commander of the Mobile District. Upon beginning his term, he met with district lawyers and his chief of construction to discuss how to dispose of long standing claims. Unaware of Granite's prior interest in ADR, Col. Dunn decided that the use of a neutral technical expert was the best approach to settle the Granite claim. He called Mr. Roberts directly and asked if he was willing to use ADR. When Mr. Roberts agreed, Col. Dunn instructed the Office of Counsel to contact Mr. Bastianelli to work out an ADR agreement.

PROS AND CONS OF ADR: THE CORPS

Col. Dunn's decision to use ADR was based on a number of criteria. First of all, Col. Dunn found Granite and its CEO to be highly reputable. Dunn had worked with Granite many years prior to this case, and believed Granite did not fit into the "category of contractors who use claims to boost profits."

Dunn preferred to settle the claim based on its technical merits through good faith negotiations. After speaking with Mr. Roberts, Dunn was assured that Roberts, not his attorney, was the actual decision maker regarding the claim, and that he would engage in a good faith effort to seek a mutually feasible settlement during the ADR procedure. If Col. Dunn felt the contractor could not satisfy this condition, he would have insisted the claim be settled through traditional means. Dunn also recognized the government could potentially save money in the long run because of the expenses, in terms of time and money, necessary to defend the case.

The Office of Counsel agreed with the decision to use ADR because of an uncertain degree of Government exposure. In the contract, the Corps had approved the sand source with no qualifications, and though everyone involved knew the Real Estate Division would condemn the land, it was unclear when R&S would be forced to leave the site.

PROS AND CONS OF ADR: THE CONTRACTOR

Granite requested the use of ADR primarily to assure itself of an expeditious decision and payment. At the time, the company was still awaiting decisions on three other claims related to the same project that had been tried at the Board four years earlier. According to Roberts, contractors do whatever is reasonably possible to avoid the Board.

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ADR also provided advantages other than savings in time and legal fees. Since a cement construction expert would preside over the hearing, discussions would center on issues of the sand source and associated problems, not on questions of procedure and rules of evidence. The neutral would understand technical information without the days of explanation usually required for judges to gain an understanding of the issues. Finally, ADR allowed Roberts to meet with the District Commander, that is, come face-to-face with a person who had the authority to make a decision rather than go before a faceless system he saw denying him a just settlement.

CHOICE OF ACTUAL PROCEDURE

The procedure chosen to settle this case was a non-binding arbitration hybrid. (Granite originally suggested a mini-trial, but the Corps preferred a single, neutral arbitrator who was an expert in cement construction.) In this procedure, the arbitrator listens to the presentations of each side and then has approximately two weeks to review the testimony and make a recommendation for resolution. The neutral then presents his report to the decision-makers who are free to ask questions about his findings. Following this meeting, the decision-makers attempt to negotiate an acceptable settlement.

Col. Dunn preferred this arrangement to a mini-trial because of the senior executive time commitment the latter involves. He wanted a neutral expert to sift through the material and provide a condensed report the decision-makers could use to determine a settlement. He had already heard "war stories" about the enormous amount of time and energy required for a mini-trial and decided arbitration was the most efficient way to evaluate and resolve this claim.

FORMAL AGREEMENT TO USE ADR PROCEDURE

The attorneys for both sides formulated the ADR agreement outlining the specifics of the procedure. They decided the neutral arbitrator would be an expert in mass concrete construction; the presentations would be given by technical experts in whatever form they chose; lawyers would be available when needed but not present during the presentations;¹ and there would be no cross examinations. The neutral would be free to ask questions at any point during the presentations. All other questions would be referred to the neutral in writing. He then had the option of asking them or not. The neutral was to have ten days to write his report and present his recommendation to the decision-makers. Many of these conditions were an attempt to reduce the level of adversity among presenters.

The attorneys agreed to exchange exhibits and submit them to the neutral seven days prior to the hearing. There was to be no written record of the procedure. If they failed to settle the claim and proceeded to trial, all information generated from the hearing would be kept confidential including the report, and the neutral advisor would be disqualified as a witness for either party. Any offers made during the procedure would be formally withdrawn if the parties failed to reach resolution.

¹ The Mobile District chose to limit attorney involvement because of their extensive involvement in the discovery process and settlement conferences. It felt that the technical neutral advisor would receive more objective information directly from technical staff and experts. Granite's attorney felt he could give a better presentation, but went along with this model to satisfy the Corps. He believed this was the only way the Corps would accept ADR, and so made the concession.

In actuality, documents were exchanged seven days before the presentations, but Granite submitted additional exhibits just prior to the procedure. The Corps decided that future ADR agreements should include a clause prohibiting the addition of documents at the time of the arbitration.

SELECTION OF NEUTRAL

The Corps decided to use one neutral rather than a panel of three because of the difficulties involved in finding three mutually acceptable panel members. It also felt such a search would be time consuming and expensive. However, it left open the option of a three-member panel if the parties failed to resolve the claim with one neutral.

The first neutral selected by both sides, an expert in mass cement placement, refused their request to participate. Their second choice was Mr. Chris Woods, a semi-retired executive from the Al Johnson Construction Company. Mr. Woods had experience with mass concrete placement because of his company's work on the Tennessee Tombigbee Waterway.

During the process of selecting a neutral, Granite offered the names of retired Corps employees because it did not think the Corps would accept a neutral from the private construction industry. Granite, surprised that the Corps recommended its original choice and then Mr. Woods, readily accepted the Corps' choice. Col. Dunn selected Mr. Woods because the District's technical staff knew him to be highly reputable. Dunn knew that if his staff questioned the integrity of the neutral, they would resist the use of an ADR procedure.

PRIOR EXPERIENCE WITH ADR

Of the primary participants, only Chris Woods had previous experience with ADR. Woods serves on arbitration panels in construction disputes for the American Arbitration Association. In past cases, he has both issued binding decisions and mediated settlements before rendering a decision. In this case, he was asked to provide a non-binding recommendation.

None of the other participants had actual experience, but all had been exposed to the concepts of ADR. Adrian Bastianelli participated in three training programs sponsored by the American Bar Association and explained ADR to his client, Mr. Roberts. Col. Dunn learned of ADR in a commander's course and was familiar with the Chief Counsel's desire to relieve the Board backlog using ADR. Larry Beale had no prior direct experience with ADR, but was familiar with it because the first Corps mini-trial involved a Mobile District contract.

ADR PROCEDURE

PARTICIPANTS

The neutral arbitrator was Chris Woods. Jim Brock, Chief of Claims, Construction, was the primary representative for the Government. He was aided by John Bennett, Resident Engineer of the Aberdeen Lock and Dam, and Jerry Joiner, a retired federal employee hired as a consultant. Granite's chief presenter was Dick Lewis, an engineer on the project. He was accompanied by four technical experts.

The decision-makers, Col. Dunn and Mr. Roberts, were not present during the hearing, nor were their lawyers, although the latter were available for consultation as needed.

SCHEDULE

The hearing was scheduled for March 19 and 20, 1987 in the Mobile District Office. Granite presented its case first. This took about five hours. All four of its witnesses participated. This was followed by a two hour Corps rebuttal and an hour for the contractor's response. The second day began with the Corps' presentation and followed the format of the previous day. Throughout the presentations, Mr. Woods asked questions of the witnesses.

Following the hearing, Mr. Woods returned to Minnesota to write his report and make his recommendations. On April 9th, he flew back to Mobile to present his findings to the decision-makers. Neither side knew the contents of his report prior to the meeting.

After Woods presented his findings and explanations, the decision-makers asked questions regarding specific points. At the conclusion of this four hour meeting, each decision-maker met with his attorney and staff. Col. Dunn and Mr. Roberts then met alone to negotiate a settlement. After thirty minutes, they decided to accept the recommendation proposed by Chris Woods.

DESCRIPTION

Granite built its entitlement case around the contract which unequivocally stated that R&S could mine the site for sand. By condemning the land, the Corps deprived R&S of its right to the sand source. Granite stated that the Real Estate Division of the Corps informed it the site would be condemned after completion of the project. Granite also contended that the Corps could have taken the property in two installments at an additional cost of only a few thousand dollars. This would have allowed Granite to complete its work and would not have adversely affected the Government's schedule.

The second half of its case concerned quantum. Granite showed cement production levels and costs associated with the initial sand source as compared to the actual cost and time frame of the project. It requested the difference between the two plus the cost of delays resulting from the search for another site and the time involved in moving the plant.

The Corps' case regarding entitlement stated that the contractor knew the site was going to be condemned. It held that Granite should have secured an alternative sand source or stockpiled a sufficient amount of sand before the property was seized. The Corps then presented its own figures regarding number of delay days and costs per day.

Woods occasionally had to diffuse hostility between the technical presenters. He felt the parties were too emotionally entrenched in their own positions to see the other side's perspective. During the presentations, the Corps attorney was in his office and Granite's attorney was in a hotel room. Each helped prepare his side's initial presentations and the next day's rebuttals.

NEUTRAL'S PRESENTATION OF THE REPORT

The neutral presented his report to the decision-makers simultaneously. No one on either side was privy to his findings prior to the meeting. It was purposely arranged this way to avoid negative biases against the report prior to negotiations. At the meeting, the decision-makers raised a number of questions concerning specifics of the report. The contractor was especially concerned about the neutral's calculations of daily production figures. Some factual errors were corrected and the settlement figure adjusted when necessary. Changes were made only regarding points the decision-makers agreed were valid. They did not debate the findings, but merely sought to understand the reasoning behind the neutral's decision.

NEUTRAL'S DECISION

Chris Woods determined that Granite did in fact have entitlement in the claim. He found that according to the contract, Granite had the right to mine sand from the area and that this right was rescinded because of schedule changes beyond the control of the contractor.

To determine the settlement figure, Woods relied on his own expertise in the construction industry. He disagreed with Granite's formulations of the delay period and losses per day. He determined an equitable settlement based on his own best judgement of a reasonable delay period and losses per day of delay based on the realistic amount of tonnage that could have been processed at the plant. Woods realized his decision was non-binding and that during subsequent discussions the decision-makers were free to make any adjustments they saw fit.

The settlement figure Woods recommended was that the Government adjust the contract by \$675,799 plus an additional \$32,716 in ownership costs, a thirty-five day extension, and a release of \$17,115 in liquidated damages for a total of \$725,630 plus interest.

DECISION-MAKERS AGREEMENT TO ACCEPT RECOMMENDATION

Following presentation of the report, both sides met independently with their counsel and technical experts to inform them of the neutral's findings. Colonel Dunn and his staff agreed that it was in the best interests of the Government to accept the recommendation of the arbitrator, although Jim Brock advised Dunn to accept entitlement but to try to reduce the quantum. Dunn felt that Woods had built a logical, cohesive

argument to support his findings, and in the interests of saving time, Col. Dunn was willing to accept the "prudent experience of the neutral."

In discussion with his attorney, the contractor determined that Col. Dunn was unlikely to settle for an amount higher than indicated in the report. Even though he was disappointed with the recommendation, Roberts felt his alternatives were unsatisfactory. Granite's only alternative was the Board, and he felt that any additional money he might receive at a trial would be offset by increased legal costs and time before payment. By agreeing to the amount set by the neutral, Granite would be able to dispose of this claim and get paid in a timely manner.

When the two met to discuss the matter, Col. Dunn approached Mr. Roberts by saying it was clear that neither side was totally satisfied with the recommendation. He knew it was possible to examine the report issue by issue and successfully argue for certain changes. However, in the name of expediency and to avoid positional bargaining and possible impasse, the Government was willing to accept the settlement outlined by Mr. Woods.

Roberts accepted, and the meeting was over within thirty minutes. The only outstanding issue was the calculation of interest. The Government sought a variable interest rate from the time of claim certification and the contractor sought a fixed rate. This was later resolved according to standing law which states that interest is to be calculated according to fixed interest rates.

EVALUATION

PROCESS

The decision-makers and attorneys were satisfied with the process and felt both sides were afforded a fair hearing and presented their cases well. At least one Corps District person questioned the integrity of the neutral after the hearing on the grounds that he may have been biased toward the contractor. He felt that Woods failed to understand some of the issues and that he acted as an administrative judge rather than a technical expert. However, this person thought the Board would have reached a similar conclusion since he believes the Board is more sensitive to contractors trying to earn a living than to the Government and its "deep pockets."

Roberts did not feel he could reject the settlement without dealing a severe blow to the use of ADR. His decision was partly based on a desire to promote ADR throughout the Corps. He liked the procedure and wanted to be able to use it in the future. Many contractors feel that Board backlog has reached a such point that any alternative brings welcomed relief from a frustrating system. Granite itself has three outstanding claims at the Board which are not expected to be resolved within the next few years.

Bastianelli is a strong supporter of ADR as an alternative to backlogged court systems. He thinks that it is the best process for dealing with claims since it reduces legal expenses for both sides by facilitating the flow of technical information to experts. Another advantage is that decision-makers are high level people outside the emotional entrenchment of the dispute. Finally, Bastianelli sees the outside party as a face-saving device when parties are unable to retreat from their positions. In the end, one can avoid admitting fault by claiming he could not argue against the neutral.

According to Col. Dunn, claims often question the self worth or integrity of district staff. If the District Engineer, their boss, settles a claim the staff feels is "win-able," they are unlikely to support ADR and will second-guess decisions to settle. For these reasons, Col. Dunn thought it was important to achieve District support for ADR and be assured that he and the contractor would package the settlement as a "win-win" resolution.

Dunn discussed his decision to use ADR with his District Counsel, Chief of Construction, and Resident Engineer. He explained the criteria upon which he based his decision and the long term advantages of settling the claim even if they may have won before the Board. He explained that an ADR program improves the District's reputation for dealing with claims in a reasonable manner which in turn improves the Corps' relationship with contractors.

Woods found that keeping the lawyers out of the hearing was helpful because witnesses were able to testify without being prompted by attorneys. This allowed more information to be exchanged. Secondly, he felt the smaller the group of people, the less opportunity for conflict.

QUANTUM

Neither side was completely satisfied with the quantum recommended by the neutral arbitrator. However, both sides were interested in settlement and the figure was clearly not so far out of their ranges that they were compelled to reject it. Given the broader picture and its implications, both sides found it was in their best interests to accept the *recommendation of the neutral and to be done with the claim.*

Woods based his decision on a calculation of hypothetical production capacity. Roberts disagreed with his assumptions. Roberts, while in no way questioning Woods' integrity, thought perhaps that the decision was tempered to what Dunn would accept.

Roberts probably would have preferred a mini-trial providing a greater chance to negotiate. In an arbitration procedure, even non-binding arbitration, the decision-makers are less involved in the process and therefore less committed to the proposed resolution of differences.

POSTSCRIPT:

Granite had another claim literally on the heels of this one. When the contracting officer denied the claim, Bastianelli requested the use of ADR. The Corps agreed, but asked to hold one negotiating session prior to arranging the procedure. At that meeting, they reached settlement and therefore did not have to proceed with ADR. This may be evidence of the effects of a successful ADR procedure. The Corps felt Granite had a valid claim and adjusted its settlement offer after calculating what it expected from a neutral arbitrator.

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